



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 21, 2003

Mr. William R. Crow  
Corporate Counsel  
San Antonio Water System  
P. O. Box 2449  
San Antonio, Texas 78298-2449

OR2003-5898

Dear Mr. Crow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185576.

The San Antonio Water System ("SAWS") received a request for "a copy of the Investigative report that was created by [a named individual's] complaint on behalf of his wife." You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted by an interested third party. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you state that a portion of the submitted information is subject to a previous ruling by this office. In Open Records Letter No. 2003-4269 (2003), this office determined that, in accordance with rule 503 of the Texas Rules of Evidence, SAWS must withhold the information you have presently submitted as Exhibit C.<sup>2</sup> As the facts and circumstances surrounding that ruling do not appear to have changed, you must continue to withhold Exhibit C in accordance with our previous ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). As Exhibit C has previously been ruled upon, we only address the public nature of Exhibits A, B, and D.

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<sup>1</sup>We note that you have withdrawn your assertion of sections 552.117 and 552.137 of the Government Code.

<sup>2</sup>This document was previously submitted as Exhibit B-2.

Next, we note that Exhibit A is subject to section 552.022 of the Government Code, which provides in relevant part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code § 552.022(a)(3). Exhibit A constitutes a contract that relates to the expenditure of public or other funds by a governmental body subject to section 552.022(a)(3). This exhibit must be released unless it is confidential under other law. *See* Gov't Code § 552.022(a)(3). You raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence with regard to this document. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and the Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether Exhibit A is confidential under rule 503. *See* Open Records Decision No. 677 (2002).

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the privileged information is confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

After reviewing your arguments and Exhibit A, we find that this document does not constitute a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client pursuant to rule 503. Therefore, Exhibit A may not be withheld under rule 503.

You also claim that Exhibits B and D are confidential attorney-client communications under rule 503 of the Texas Rules of Evidence and therefore may be withheld under section 552.101 of the Government Code.<sup>3</sup> Information protected by the attorney-client privilege, but not subject to section 552.022 of the Government Code, is excepted under section 552.107 of the Government Code, which is the proper exception to raise for this type of information. Open Records Decision No. 676 at 7-8 (2002). Your argument for Exhibits B and D will therefore be addressed under section 552.107 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the

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<sup>3</sup>Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

After reviewing Exhibits B and D, we find that they do not constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client governmental body. Therefore, we conclude that you may not withhold Exhibits B or D under section 552.107 of the Government Code. Accordingly, we will address your remaining arguments under section 552.101 and 552.102 for Exhibits A, B, and D.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See Open Records Decision No. 327 at 2* (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v.*

*Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. See *Industrial Found.*, 540 S.W.2d at 683-85. Accordingly, we will consider your arguments regarding sections 552.101 and 552.102 together.

Information is protected from disclosure under the common-law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *Industrial Found.*, 540 S.W. at 683-85. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. See *id.* at 683. After carefully reviewing your arguments and Exhibits A, B, and D, we find that none of this information is protected from disclosure under the common-law right to privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 438 (1986) (work behavior of public employee and conditions for employee's continued employment are matters of legitimate public interest not protected by common-law right of privacy), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy is confined to information that reveals "intimate details of a highly personal nature"), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).

You also assert that the submitted information is confidential under constitutional privacy. Constitutional privacy, which is also incorporated by section 552.101 of the Government Code, consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" that include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy and includes only information that concerns the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Having reviewed Exhibits A, B, and D, we conclude that none of this information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. See Open Records Decision Nos. 470 (1987), 455 (1987), 444 (1986), 423 at 2 (1984).

Accordingly, we conclude that SAWS may not withhold any of the remaining submitted information under section constitutional privacy as incorporated by section 552.101.

In conclusion, you must withhold Exhibit C based on our previous ruling in Open Records Letter No. 2003-4269 (2003). You must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

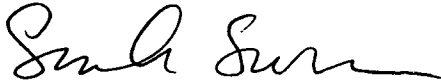
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 185576

Enc. Submitted documents

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